

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael Wigley and Robert Jackson,
Complainants,

vs.

**FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER**

Orono Public Schools, ISD 278, Jack
Veach, Dick Lewis, Martha Van de Ven,
John Malone, Michael Bash, Michele
Kunz, Karen Orcutt, and Orono Kids
Matter,

Respondents.

The above-entitled matter came on for an evidentiary hearing on July 9, 2008, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Steve M. Mihalchick and William R. Johnson. The OAH hearing record closed on July 22, 2008, with the filing of the parties' written closing argument.

Erick G. Kaardal and William H. Mohrman, Attorneys at Law, Mohrman & Kaardal, P.A., 33 South Sixth Street, Suite 4100, Minneapolis, MN 55402, appeared for Michael Wigley and Robert Jackson (Complainants).

Robert J. Hennessey and Carla Vehrs, Attorneys at Law, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2274, appeared for Orono Kids Matter (Respondent).

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

Did Respondent fail to file a financial report required by Minn. Stat. § 211A.02?

The panel concludes that the Complainants have failed to establish that the Respondent violated Minn. Stat. § 211A.02, and therefore the Complaint is dismissed.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. The Orono Public School District (School District) serves all or part of the following western Minneapolis suburbs: Independence, Long Lake, Maple Plain, Medina, Minnetonka Beach, and Orono.

2. According to the School District's website, the School District has approximately 12,700 residents and 1,877 families with children.

3. On November 8, 2007, the Orono school board authorized a \$39.4 million bond referendum and scheduled the referendum for a special election to be held on February 12, 2008.¹

4. Respondent Orono Kids Matter is an association of school district residents formed to support the bond referendum. There are approximately 15 to 20 core members of Orono Kids Matter, and about 100 other parents who are involved more peripherally in the organization.²

5. Martha Van de Ven was elected to the Orono School Board in 1991 and has served as a board member since that time. She is also a member of Orono Kids Matter.³

6. Kelly Shaughnessy is the Chairman and Treasurer of Orono Kids Matter.⁴

7. The residents of the Orono School District voted to approve the bond referendum in the February 12, 2008, election.

8. On April 28, 2008, the Complainants filed a campaign complaint in this matter, alleging in relevant part that Orono Kids Matter had failed to file financial reports acknowledging contributions received from the school district in the form of school district staff time used to produce a digital video disk (DVD) regarding the referendum, blank disks used to reproduce the DVD, and parent and guardian address lists used to mail campaign material concerning the referendum.⁵

The DVD

9. In late November of 2007, the School District produced a DVD in support of the bond referendum. The DVD is about 26 minutes long and is divided into two sections. The first section is 11 minutes and consists of individual members of the School Board and School District staff explaining the reasons for proposing the bond referendum. The second section is 14 minutes

¹ Complaint Ex. 3.

² Testimony of Martha Van de Ven.

³ *Id.*

⁴ *Id.*; Testimony of Kelly Shaughnessy; Exs. 1, 3-7.

⁵ Complaint at 7, 12-13, & 21.

and consists of members of the School District's "Facilities Task Force" addressing the need to replace or repair the heating systems, roofs, and electrical systems in various School District buildings.⁶

10. Melanie Deluca, the School District's Community Education Director, filmed the video footage and produced the DVD on a computer at her cabin over the Thanksgiving break. She did this on a volunteer basis and was not compensated for her services.⁷

11. The School District originally intended to post the DVD as a link on its website; however, the School District determined that its website did not have the capability to permit the viewing of the DVD. Thereafter, the School District gave permission to Orono Kids Matter to reproduce and distribute copies of the DVD to residents of the school district.⁸

12. On or about December 20, 2007, Orono Kids Matter paid Penny Pease, a School District employee and volunteer, \$93.96 to make 100 copies of the DVD.⁹

13. On or about January 22, 2008, Orono Kids Matter paid Ms. Pease \$111.96 to make 100 more copies of the DVD.¹⁰

14. Orono Kids Matter distributed copies of the DVD to parent leaders and at informational gatherings ("coffees") arranged by members of the committee.¹¹

15. Shortly thereafter, Orono Kids Matter decided to distribute the DVD more broadly, and it paid \$1,757.25 to have an additional 1,500 copies of the DVD made commercially.¹² Orono Kids Matter then mailed copies of the DVD to residents of the district.¹³ On the DVD envelopes, Orono Kids Matter attached a label providing in relevant part "Prepared and paid for by: Orono Kids Matter PO Box 186, Long Lake, MN 55356." This statement was included on the label to comply with the disclaimer requirement of Minn. Stat. § 211B.04.¹⁴

16. Orono Kids Matter paid nothing to the School District for the production of the DVD.¹⁵

⁶ Ex. 16.

⁷ Test. M. Van de Ven.

⁸ *Id.*

⁹ *Id.*; Testimony of Kelly Shaughnessy.

¹⁰ Test. of M. Van de Ven and K. Shaughnessy.

¹¹ Test. of M. Van de Ven.

¹² *Id.*; Test. of K. Shaughnessy; Ex. 5.

¹³ Test. of M. Van de Ven.

¹⁴ *Id.* The disclaimer requirement was found to be unconstitutional in *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

¹⁵ Test. of M. Van de Ven.

17. Orono Kids Matter did not list the DVD on its campaign finance report as an in-kind contribution from the School District.

18. There is no evidence that Orono Kids Matter received blank disks from the School District for the purpose of copying the DVD.

19. In campaign finance reports filed between January and July 2008, Orono Kids Matter reported expenditures of \$93.96, \$111.96, and \$1,757.25 for the cost of copying the DVD.¹⁶

Street Addresses and Mailing Labels

20. On or about December 17, 2007, Orono Kids Matter requested an electronic file containing “directory information” from the School District.¹⁷ The file contained the “head of household” names and mailing addresses of 1,582 school district residents. The School District provided the information to Orono Kids Matter. On a “Report Order Request” form, the School District indicated that the cost for emailing the 1,582 records to Orono Kids Matter was \$40.¹⁸

21. On or about December 18, 2007, Orono Kids Matter requested an electronic file from the school district containing the names and addresses of residents who had graduated from Orono High School between 2004 and 2007. On a “Report Order Request” form, the School District indicated that the cost for emailing the 486 records to Orono Kids Matter was \$30.¹⁹

22. On or about January 25, 2008, Orono Kids Matter requested from the School District five sets of mailing labels with residents’ names and addresses.²⁰ The School District provided the mailing labels to Orono Kids Matter. On a “Report Order Request” form, the School District indicated that the cost for the five sets of labels was \$65.²¹

23. In prior referendum elections, the School District has, on request and for a fee, provided the same types of records containing residents’ names and addresses to groups opposed to the referendum.²²

24. The Complainants did not request these types of records from the School District in connection with the February 12, 2008, election.

¹⁶ Exs. 1, 3-6. On two occasions, Orono Kids Matter double-reported expenditures for DVD reproduction. Orono Kids Matter filed amended reports to correct the reporting errors.

¹⁷ “Directory information” is public data on individuals under the Minnesota Government Data Practices Act. See Minn. Stat. § 13.32, subd. 5.

¹⁸ Ex. 8.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Test. of M. Van de Ven.

25. Orono Kids Matter used the names and addresses it obtained from the School District to mail campaign information, including the DVD, to those residents.²³

26. After receipt of the complaint in this matter, Ms. Van de Ven examined the back-up documentation for expenses Orono Kids Matter had reported. She then realized that Orono Kids Matter had not yet paid for the directory information and mailing labels it had requested and received in December and January. Ms. Van de Ven asked the School District to send her copies of the request orders.²⁴ Orono Kids Matter paid the specified charges in June 2008, and it identified these expenditures on its campaign finance report filed July 2, 2008.²⁵

Email Lists

27. Orono Kids Matter also sent written campaign material to school district residents via email. The parents involved in Orono Kids Matter collected email addresses known to each other and set up an email marketing account for use by Orono Kids Matter. Orono Kids Matter did not obtain any list of email addresses of school district residents from the School District.²⁶

28. Lisa James, a resident of the school district, received an email message from Orono Kids Matter urging residents to vote “yes” on the bonding referendum. Ms. James, who was active in a group opposed to the referendum, does not know how or from whom Orono Kids Matter obtained her email address.²⁷

29. Some school district residents who received paper mailings from Orono Kids Matter, including the DVD, received no email messages from the group.²⁸

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. The burden of proving the allegations in the complaint is on the Complainants. The standard of proof of a violation of Minn. Stat. § 211A.02, is a preponderance of the evidence.²⁹

²³ Test. of M. Vande Ven.

²⁴ Ex. 8.

²⁵ Test. of M. Van de Ven and K. Shaughnessy; Ex. 7.

²⁶ Test. of M. Van de Ven and K. Shaughnessy.

²⁷ Testimony of Lisa James.

²⁸ Exs. 22, 24 & 25.

3. “Preponderance” means greater weight of the evidence. It means that all of the evidence, regardless of which party may have produced it, must lead the panel to believe that the fact at issue is more likely true than not true. Greater weight of the evidence does not necessarily mean the greater number of witnesses or the greater volume of evidence. Any believable evidence may be enough to prove that a disputed fact is more likely true than not.³⁰

4. Minn. Stat. § 211A.01, subd. 4, defines “committee” as “a corporation or association or persons acting together to influence the nomination, election, or defeat of a candidate or to promote or defeat a ballot question.”

5. Respondent Orono Kids Matter is a “committee” as defined in Chapter 211A.

6. Under Minn. Stat. § 211A.02, subd. 1, a committee or candidate acting to promote or defeat a ballot question who receives contributions or makes disbursements of over \$750 in a calendar year, must file financial reports with the appropriate filing officer.

7. “Contribution” is defined as anything of monetary value that is given or loaned to a candidate or committee for a political purpose. “Contribution” does not include a service provided without compensation by an individual.³¹

8. “Disbursement” means money, property, office, position, or any other thing of value that passes or is directly or indirectly conveyed, given, promised, paid, expended, pledged, contributed, or lent. “Disbursement” does not include payment by a county, municipality, school district, or other political subdivision for election-related expenditures required or authorized by law.³²

9. Orono Kids Matter received contributions and made disbursements of over \$750 in a calendar year, and it was therefore required to file campaign finance reports.

10. Orono Kids Matter filed all required campaign finance reports.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

²⁹ Minn. Stat. § 211B.32, subd. 4.

³⁰ *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn.1980); *Benson v. Northland Transp. Co.*, 200 Minn. 445, 450-51, 274 N.W. 532, 534-35 (Minn. 1937).

³¹ Minn. Stat. § 211A.01, subd. 5.

³² Minn. Stat. § 211A.01, subd. 6.

ORDER

IT IS ORDERED:

That the Complaint in this matter is DISMISSED.

Dated: July 30, 2008

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Presiding Administrative Law Judge

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

w/William R. Johnson
WILLIAM R. JOHNSON
Administrative Law Judge

MEMORANDUM

Chapter 211A is applicable to ballot questions to be voted on by voters of one or more political subdivisions but not by all the voters of the state. Section 211A.02 requires that a committee or a candidate who receives contributions or makes disbursements of more than \$750 in a calendar year shall submit an initial report to the filing officer within 14 days after the candidate or committee receives or makes disbursements of more than \$750 and shall continue to make the reports until a final report is filed. The receipt of “contributions” or the making of “disbursements” is the threshold requirement for the filing obligation. Unlike Minn. Stat. § 10A.025, which is applicable to state-wide or judicial elections and which prohibits the filing of statements containing knowingly false information or omissions, there is nothing in § 211A.02 that provides for the assessment of penalties for inaccurate information, false statements, or poor record-keeping. Instead, the remedy is to require the filing of the report.³³

³³ Section 211A.05 requires each candidate or the treasurer of a committee to certify to the filing officer either that all reports have been submitted as required or that the candidate or committee is not obligated to make such reports. If a candidate or committee fails to file a report with the appropriate filing officer within ten days of notification of the failure to file, the filing officer is obligated to file a complaint under Minn. Stat. § 211B.32.

The Complainants alleged, in relevant part, that Orono Kids Matter had failed to file financial reports under Minn. Stat. § 211A.02. In the summary of alleged violations by Orono Kids Matter, the Complaint provides “Minn. Stat. § 211A.02, failure to file a financial report (under reporting).”³⁴ Under-reporting could be a violation of § 211A.02, if a committee or candidate under-reported a contribution or disbursement that would have caused the committee or candidate to meet the threshold for filing a financial report.³⁵ In the course of the hearing, however, it became clear that Orono Kids Matter met the threshold requirements for filing financial reports before the election and had filed all the required reports.³⁶

The main issue the Complainants seek to address is whether, instead of reporting the costs pertaining to distribution of the DVD, street addresses, and mailing labels as expenditures made in support of the referendum, Orono Kids Matter should have reported them as in-kind contributions received from the School District having a far greater value than the amounts reported as expenditures. The allegation that a committee treasurer has failed to keep correct accounts or has filed inaccurate information would be a violation of Minn. Stat. § 211A.06. Pursuant to Minn. Stat. § 211A.06, a treasurer who fails to keep a correct account of money received for a committee “with the intent to conceal receipts or disbursements, [or] the purpose of receipts or disbursements” is guilty of a misdemeanor. This violation was not alleged in the Complaint, and that issue accordingly is not properly before the panel.

Even if the Complainants had properly alleged a violation of Minn. Stat. § 211A.06, the panel would conclude that the Complainants failed to show that Orono Kids Matter failed to keep correct accounts with the intent to conceal either the receipt or purpose of any contribution made by the School District. The evidence submitted by the Complainants was that, if commercially produced, the DVD would have cost between \$5,000 and \$10,000. The Complainants also argued that the street addresses and mailing labels provided by the School District were worth much more than the \$135 charged by the School District and paid by Orono Kids Matter. According to the Complainants, resident mailing addresses, if public data, would have cost between 10 to 25 cents per mailing address per use if obtained commercially. If the addresses were not public data, the Complainants contended that their value would be even greater because the information would not be generally available to the public.³⁷ The Complainants argued that their evidence on the value of the DVD, street addresses and mailing labels was “unchallenged” and must be accepted by the panel.

Orono Kids Matter maintained, as a factual matter, that school district employees volunteered their time to make the DVD for the School District. Any time donated by those employees was contributed to the School District, not to Orono Kids Matter. When the School District was unable to post the DVD on the

³⁴ Complaint at 2.

³⁵ See *Wenzel v. Harder*, OAH No. 8-6301-19262-CV (Oct. 22, 2007).

³⁶ Exs. 1-7.

³⁷ Testimony of Michael Wigley, Robert Jackson.

website as planned, Orono Kids Matter reproduced it, distributed it, and declared all expenses relating thereto on its financial reports. With regard to the mailing addresses, Orono Kids Matter further contends that the mailing lists are routinely provided to entities that request the lists, and there is no evidence that Orono Kids Matter received any preference unavailable to the public in terms of the content or cost of the lists. Finally, Orono Kids Matter contended the Complainants' evidence concerning value was "unchallenged" only because the Complainants failed to disclose it either in the Complaint or in their prehearing submissions.³⁸

With regard to the DVD, the Complainants presented speculative evidence that it would have cost substantially more to make the DVD if the school district had hired professionals and paid the going rate for the production. Even assuming that market value were the appropriate standard for determining whether a donation was correctly accounted for, however, the cost of producing the DVD would not translate to the market value of a single copy. Fair market value means the value one would have to pay to obtain equivalent goods or services in the marketplace. If this issue had been properly presented to the panel as a claimed violation of § 211A.06, the panel would conclude that Complainants failed to show that a 26-minute DVD depicting School District board members, staff, and task force members discussing the need for funding and facility maintenance would have any value in the marketplace. It is akin to the exception to the ban on lobbyist gifts to legislators found at Minn. Stat. § 10A.071, subd. 3(a)(6), for "informational material of unexceptional value."³⁹

With regard to the street addresses and mailing labels, the Complainants' evidence again was that it would cost much more to purchase these items from a commercial list seller on the open market. It would be difficult to reconcile a "market value" standard with a school district's obligations under the Minnesota Government Data Practices Act. Under the Act, a school district is required to provide copies of public data upon request and may charge only the actual costs of searching for, retrieving and copying the data.⁴⁰ Information designated by a school district as "directory information" is public data unless students and/or their parents have informed the district not to treat the data as directory.⁴¹ The record in this case reflects that the school district has provided this type of information to groups both supporting and opposing ballot questions in the past for similar fees. There is no evidence that the School District charged Orono

³⁸ The witness list filed by the Complainants said only that the Complainants' expected testimony "relates to foundation of evidence supporting allegations of complaint."

³⁹ Cf. Advisory Opinion 269 (Ethical Practices Board, May 23, 1997) (organization could provide copies of an audio tape of a public policy forum to legislators without charge. Board found that even though the organization charges the public between \$4 and \$6 per tape, it fell within the "material of unexceptional value" exception to the gift ban).

⁴⁰ Minn. Stat. § 13.03, subd. 3(c) (If one hundred or fewer paper copies are requested, the government entity may charge no more than 25 cents per page).

⁴¹ Minn. Stat. § 13.32, subd. 5. Whether the school district properly obtained consent from residents whose names are in the directory is not an issue before the panel.

Kids Matter less than it would have charged anyone else, assuming such a request had been made.

With regard to email addresses, there is no credible evidence that the School District provided any email addresses to Orono Kids Matter, whether through its Honeywell Instant Alert System or otherwise. Even some of the individuals who objected to receiving any mail from Orono Kids Matter, and who had provided their email addresses to the School District, received no campaign material by email from Orono Kids Matter.⁴²

Orono Kids Matter filed detailed financial reports between January and July 2008 disclosing approximately \$20,000 in contributions and \$20,000 in expenditures. The costs relating to the DVD were disclosed from the very first filing, and the expenses for street addresses and mailing labels (totaling \$135) were paid in June and reported a few days later. In sum, Orono Kids Matter properly filed all reports required under Minn. Stat. § 211A.02. Under Minn. Stat. § 211A.06, the focus properly would be on whether Orono Kids Matter kept incorrect accounts with the intent to conceal the source or purpose of donations made by the School District. If the claim under § 211A.06 had been properly alleged, the panel would conclude that the evidence is insufficient to find such a violation as a matter of law.

K.D.S., S.M.M., W.R.J.

⁴² For example, Thomas and Betty Howes filed affidavits in this matter objecting to the School District's provision of their home address to Orono Kids Matter without their consent. Although the affidavits provide in ¶ 3 that the Howes gave their home address and email address to the School District only for specific purposes, the Howes did not apparently receive any email from Orono Kids Matter. See Exs. 22 and 24. See *also* Ex. 25 (another individual who apparently provided an email address to the school district received no email communications from Orono Kids Matter).